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Nos. 644, 693

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

CONTINENTAL OIL COMPANY, GENERAL CRUDE
OIL COMPANY, M. H. MARR, SUN OIL COMPANY,
TEXAS EASTERN TRANSMISSION CORPORATION,
Respondents.

FEDERAL POWER COMMISSION,
Petitioner,

v.

M. H. MARR, SUN OIL COMPANY, CONTINENTAL
OIL COMPANY, GENERAL CRUDE OIL COMPANY,
TEXAS EASTERN TRANSMISSION CORPORATION,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**JOINT BRIEF OF RESPONDENTS
IN OPPOSITION**

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OPINIONS BELOW

The Opinion of the Court of Appeals, Fifth Circuit, is reported in 336 F. 2d 320. It is also reprinted as Appendix A (pp. 1a-14a) to the Petition of UGI.¹

¹ The United Gas Improvement Company, petitioner in No. 644, is herein referred to as "UGI".

The opinions and orders of the Federal Power Commission² which were reviewed by the Court of Appeals are as follows:

Opinion and Order No. 378, issued February 6, 1963,
29 F.P.C. 249; R. 962-981

Concurring Opinion of O'Connor, C., 29 F.P.C. 258;
R. 982-984

Order issued April 2, 1963, 29 F.P.C. 692; R. 1136-
1139

Opinion and Order No. 378-A, issued July 12, 1963,
30 F.P.C. 153; R. 1223-1230

Dissenting Opinion of Woodward, C., 30 F.P.C. 157;
R. 1230-1233

JURISDICTION

The Judgment of the Court of Appeals, reversing FPC's Orders of February 6, April 2 and July 12, 1963, and remanding the causes to the Commission for further proceedings, was entered on August 3, 1964 (UGI Pet. 17a). Petitions for writs of certiorari have been filed by FPC and UGI. Two other parties who sought below to uphold the Commission's Orders — Public Service Commission of the State of New York and Public Service Electric and Gas Company — seek no review by this Court.

QUESTIONS PRESENTED

As observed by the Court below: "The principal question to be decided is whether the Commission has jurisdiction over these lease transactions" (336 F. 2d at 323, UGI Pet. p. 7a). More specifically, that principal question and further questions presented by the record herein are stated as follows:

² The Federal Power Commission, petitioner in No. 693, will hereinafter be referred to as "FPC" or "Commission".

1. Whether FPC has jurisdiction over a conveyance of leasehold interests when such conveyance is made prior to any connection to an interstate pipeline, or any sale in interstate commerce, of the gas produced from the leased properties.

2. Whether a conveyance of leasehold interests in properties located wholly within the boundaries of a single state constitutes a "sale in interstate commerce of natural gas for resale" within the contemplation of the Natural Gas Act.

3. Whether, after remand of a cause by a Court of Appeals which has reviewed an FPC decision, the Commission is bound by the appellate court's mandate.

STATUTES INVOLVED

In addition to the portions of the Natural Gas Act (52 Stat. 821; 15 U.S.C. §§ 717 *et seq.*) quoted at pages 2 and 3 of FPC's petition, Sections 2(5) and 2(6) of that Act (15 U.S.C. §§ 717 a(5), 717 a(6)) are also pertinent. They provide as follows:

Section 2. When used in this Act, unless the context otherwise requires —

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural gas and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

COUNTERSTATEMENT OF THE CASE

The statement of the case set forth in the opinion below (336 F. 2d at 320-323, UGI Pet. pp. 3a-7a) is in all respects factual and accurate, whereas petitioners' statements (FPC Pet. pp. 3-11; UGI Pet. pp. 5-10), are in several material respects misleading. Hence, we are constrained to make this counterstatement, supplementing the Court of Appeals' opinion.

Respondents M. H. Marr, Sun Oil Company, Continental Oil Company and General Crude Oil Company (collectively referred to as "Assignors") owned mineral leases covering nearly all of the potentially productive area of the Rayne Field, Acadia Parish, Louisiana.³ On July 27, 1959, the Assignors sold their Rayne Field leasehold interests, subject to certain reservations, to respondent Texas Eastern Transmission Corporation ("Texas Eastern").⁴ Up to the time of this sale of leases there had been no dedication of any Rayne Field gas to interstate sale, there had been no connection of any of the Rayne Field wells to an interstate pipeline, and there had been no sale or movement of any Rayne Field gas in interstate commerce.

FPC now contends that the sale of leases on July 27, 1959, should be deemed a "sale in interstate commerce of natural gas for resale" and hence subject to the Commission's regulatory jurisdiction. Such contention is diametrically contrary to each of the following:

³ Rayne Field is a deep, multi-strata gas-condensate field estimated to be capable of producing over one trillion cubic feet of natural gas and some 51 million barrels of condensate and plant liquids (Ex. X-2, R. 745).

⁴ The sale was made through an intermediary, Louisiana Gas Corporation, which in turn, assigned the leasehold interests to Texas Eastern. Texas Eastern was treated as the actual purchaser throughout the proceedings below and will be so treated here.

(1) This Court's landmark decision, handed down on June 20, 1949, in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498;

(2) FPC's original unanimous holding in the case at bar — Opinion No. 322, issued June 23, 1959, 21 F.P.C. 860 (R. 446-467);

(3) The firm position taken by the Commission in its Brief, dated July 11, 1960, filed in the earlier review proceeding herein before the Court of Appeals for the District of Columbia Circuit (R. 1182-1214);

(4) The unanimous opinion and judgment rendered by the D. C. Court of Appeals in this case on December 8, 1960 — *Public Service Commission of New York v. Federal Power Commission*, 287 F. 2d 146 (R. 862-868);

(5) FPC Presiding Examiner Frazee's Decision, issued therein on June 29, 1962 — 29 F.P.C. 259 (R. 877-902);

(6) FPC Commissioner Woodward's incisive dissenting opinion issued herein on July 12, 1963 — 30 F.P.C. 157 (R. 1230-1233);

(7) The unanimous opinion and judgment rendered by the Fifth Circuit Court of Appeals on August 3, 1964, review of which is now being sought — *Marr v. Federal Power Commission*, 336 F. 2d 320 (UGI, Pet. 1a-17a).

The lease sale

In December 1958, Assignors entered into an agreement to sell Texas Eastern their leasehold interests in the Rayne Field (R. 172 *et. seq.*).⁵ Texas Eastern applied to the Com-

⁵ Early in 1957 Assignors had proposed sales of Rayne Field gas to Texas Eastern under 20-year gas sale contracts. That proposal was abandoned in the summer of 1958. The tentative contracts never became effective; no gas was ever sold or delivered thereunder. As FPC frankly admitted in its Brief to the D.C. Court of Appeals, "the original program . . . has little bearing on the issues before this Court" (R. 1185). That is still true: the program which the parties abandoned a full year before consummating their lease sale transaction is thoroughly immaterial.

mission for authority to construct and operate the facilities (a short pipeline spur and a compressor station) needed to take Rayne Field gas into Texas Eastern's system. Such a certificate was granted by the Commission on June 23, 1959, in its Opinion No. 322 (21 F.P.C. 860; R. 449-467). In the course of that Opinion, the Commission said:

"Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases and we have no authority to issue such a certificate." (R. 456).⁶

Later in Opinion No. 322, the Commission emphasized that *"the purchase of the leases is not a contract to purchase gas."* (R. 462).

On July 27, 1959, the lease sale was consummated. By an Assignment and Conveyance, Assignors conveyed their Rayne Field leasehold interests to Texas Eastern (R. 184 *et. seq.*). Texas Eastern made a cash down payment and delivered to each Assignor a series of promissory notes, payable over a period of 16 years, evidencing the balance of the purchase price (R. 349-353). Each Assignor's notes were secured by a mortgage of the assets Texas Eastern was acquiring (R. 338-348). These mortgages, together with the Assignment and Conveyance, were all duly recorded in accordance with Louisiana law.

Review proceedings in the D.C. Court of Appeals

The New York Public Service Commission, an intervenor, took the Commission's Opinion No. 322 up for review before the Court of Appeals, District of Columbia Circuit. The Commission there reiterated its position that it lacked jurisdiction over the Rayne Field leasehold sale.

⁶ Emphasis in all quotations herein is ours.

Throughout its Brief, dated July 11, 1960, the Commission repeatedly disclaimed any such jurisdiction (see, e.g., R. 1185, 1200-1202, 1205, 1212).

On December 8, 1960, the Court of Appeals handed down an opinion and judgment reversing the Order accompanying the Commission's Opinion No. 322. *Public Service Commission of New York v. Federal Power Commission*, 287 F. 2d 143; (R. 862-868). The Court expressly upheld the contention of the Commission that it lacked jurisdiction over the sale of leases:

"Instead of purchasing gas in the usual manner from the four producer-sellers, Texas Eastern proposed to acquire leasehold interests in the reserves . . .

"The significance of this change in the form of the transaction, at least from the standpoint of the producer-sellers, is manifest. Sales of natural gas by an independent producer are subject to regulation under Sections 4 and 5 of the Natural Gas Act. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). But the Commission has been held to lack jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949)" (287 F. 2d at 145).

"It is of no importance here that the transactions by which Texas Eastern proposes to acquire the gas will themselves be, by virtue of a change in form, beyond the regulatory control of the Commission." (*Id.* at 146).

The Court further held, however, that there was insufficient record evidence to support the Commission's apparent general approval of the terms of the lease acquisition arrangement (*Id.* at 145). "[T]he Commission's warrant to inquire arises by virtue of its responsibility to regulate the purchaser, regardless of the status of the seller" (*Id.* at 146). Accordingly, the Court remanded the

case with directions that the Commission follow one of "two courses": either (1) "expressly disclaim any approval of the price to be paid," or (2) "permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity" (*Id.* at 146). Both at the end of its opinion and in its formal mandate, the D. C. Circuit limited the remand to "proceedings not inconsistent with the opinion of the court" (*Id.* at 146; R. 868).

Proceedings after remand

By Order issued on July 14, 1961 (26 F.P.C. 167; R. 869-872), the Commission elected to follow the second of the "two courses" prescribed by the Court of Appeals; i.e., to reopen the proceedings and afford Texas Eastern an opportunity to justify its acquisition costs. Among other things, this July 14th Order defined the issues to be tried in the reopened proceeding and, in so doing, made no reference whatever to any possible assertion of FPC jurisdiction over the sale of leases.

Further hearings were held before FPC Presiding Examiner Frazee during the latter part of 1961. None of the Assignors was represented at, or participated in, these hearings. Only Texas Eastern offered evidence, none of which had any bearing on the question of the Commission's jurisdiction over the sale of leases.

Examiner Frazee rendered his Decision on June 29, 1962 (29 F.P.C. 259; R. 877-902) and therein adhered to the repeatedly established proposition in this case that the Commission has no jurisdiction over the sale of the Rayne Field leases (R. 885-887).⁷

⁷ Examiner Frazee did, however, propose a method of regulating Texas Eastern (R. 896-899) — a method which the Commission refused to approve (29 F.P.C. at 256-257; R. 977-978).

Opinion No. 378

On February 6, 1963, the Commission handed down its Opinion No. 378 (29 F.P.C. 249; R. 962-981), asserting for the first time that it *did* possess jurisdiction over the sale of Rayne Field leases; that Assignors had not actually conveyed interests in real property, but instead had sold a commodity, natural gas, for resale in interstate commerce; and that Assignors were therefore obligated, under the Natural Gas Act, to file with the Commission applications for certificates authorizing such sale, together with "appropriate rate schedules". Opinion No. 378 went on to command Assignors and Texas Eastern to rescind the lease sale they had consummated almost four years earlier and to enter into some unspecified new contractual arrangement, effective retroactively back to the day in August 1959 (R. 721, 722) when Texas Eastern began taking gas from its Rayne Field leases.

Opinion No. 378-A

After Assignors and Texas Eastern had filed applications for rehearing (R. 984-1135), the Commission, on April 2, 1963, issued an order purportedly granting such applications, but effectively denying them (29 F.P.C. 692; R. 1136-1139). Finally on July 12, 1963, the Commission issued its Opinion No. 378-A (30 F.P.C. 153; R. 1223-1230). Therein, FPC reasserted its jurisdiction over the Rayne Field lease sale, but postponed, pending judicial review, the requirement that the parties rescind their 1959 sale of leases and enter into a new, retroactive contractual arrangement.⁸

⁸ FPC warned the parties, nevertheless, that unless they eventually do go through with rescission and revision of their lease sale, they will be subject to prosecution for violating the Natural Gas Act (R. 1228).

Commissioner Woodward dissented (30 F.P.C. 157; R. 1230-1233) with the following cogent observations:

"In this proceeding, the Commission commits grave error in attempting to exercise jurisdiction in areas forbidden to it by the Congress and the Supreme Court of the United States. To attain its objective, the Commission is now saying that any sale of property which contains gas in formation is subject to its jurisdiction. *Without question this is an unlawful assumption of jurisdiction.*" (R. 1231).

"The Commission's assertion of jurisdictional authority over the sale of leasehold rights in the Rayne Field, on the basis of an unsupported, vague and obscure dissertation, is a complete reversal of its prior position in these proceedings." (R. 1232).

"In my judgment, that opinion [*Public Service Comm. v. FPC*, 287 F. 2d 143] conclusively settled the jurisdictional question. The leasehold sale was not a sale in interstate commerce; it affected only rights and interests in real property located wholly within the State of Louisiana. Any other conclusion disparages the Court of Appeals adjudication — this fact is indisputable. *If permitted, this Commission's course of action would destroy the rights of parties to court review and render the decisions of the courts meaningless.*" (R. 1232-1233).

"Apart from its misapplication of the statute, the majority errs in attempting to force the parties here to to revise their contracts . . . there is nothing in the Act which confers such absolute power on the Commission. The majority cannot, by decree, force a meeting of the minds of the parties here involved." (R. 1233).

The opinion of the Court below

The opinion of the Fifth Circuit (336 F. 2d 320) summarizes the relevant facts (336 F. 2d at 321-323). It then discusses at some length this Court's controlling decision in

Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (*Id.* at 323-324). The opinion goes on to dispose of FPC's numerous and devious arguments (*Id.* at 324-326). And then it concludes as follows (*Id.* at 326):

"We are bound by *Panhandle's* classification of leaseholds as being part of the 'physical activities, facilities and properties' used in production and gathering . . .

"Thus, we conclude that the lease transactions in the instant case are outside the Commission's jurisdiction. The Commission complains that this will leave a 'gap' in its regulatory powers. Fifteen years ago the Supreme Court in *Panhandle* authorized the Commission to bring this to the attention of Congress, and the Commission has repeatedly done so. If in its wisdom Congress has declined to act, we have neither the power nor the inclination to act in its stead."

ARGUMENT

I.

The decision below is clearly correct.

A. This Court's decision in the *Panhandle* case is controlling here.

This Court's decision in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, is determinative of the jurisdictional question raised in the case at bar. It was there held: "that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power" (337 U.S. at 502); that Section 1(b) of the Act "expressly exempts from its coverage . . . the production and gathering of natural gas" (*Id.* at 503-504); and that:

"In *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 603, we said that this phrase ['the production or gathering of natural gas'] comprehended the *producing properties* and gathering facili-

ties of a natural-gas company. We adhere to this natural and clear meaning of the words, and their obvious expression of congressional intent. *Of course leases are an essential part of production.*" (*Id.* at 504-505).

This Court went on to reject the Commission's contentions that it was vested with jurisdiction over transfers of leases by Sections 4, 5 and 7 of the Act:

"Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms." (*Id.* at 508).

"To accept these arguments springing from power to allow interstate service, fix rates and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. *It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers, specifically denied the Commission by the words of the Act* as explained in the report and on the floor of both houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states." (*Id.* at 509-512, footnotes omitted).

"The District Court found as a fact, and the finding is undisputed by the Commission, that, 'It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases.' Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed." (*Id.* at 513).

At the end of its opinion, this Court concluded:

"As we have held above that the transfer of undeveloped gas leases⁹ is an activity related to the production and gathering of natural gas and beyond the coverage of the Act, the authority of the Commission cannot reach the sales If the Commission is of the opinion that it should have power to control the disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact." (*Id.* at 515-516).

Nothing has occurred since June 20, 1949, to weaken the authority or cast doubt on the validity of this Court's decision in the *Panhandle* case. To the contrary, it has been cited with approval and followed in numerous subsequent opinions dealing with the jurisdictional question.¹⁰

Thus, in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), on which petitioners place such heavy reliance, the *Panhandle* case was cited approvingly by this Court for the exact proposition that FPC jurisdiction does not extend to producing properties:

⁹ The leases in *Panhandle* were "undeveloped" only in the sense that they had not been fully drilled; but they were sufficiently "proven" to permit an estimate of approximately 700 billion cubic feet of underlying gas reserves, or about 12% of Panhandle Eastern's total gas reserves (337 U.S. at 499, 500). The Rayne Field leases were likewise partially "undeveloped", because they had not been fully drilled when conveyed to Texas Eastern (R. 485-486, 493-494, 536; Ex. X-5, p. 2; R. 753). However, they, too, were adequately "proven" for reserve estimation purposes.

¹⁰ See, e.g., *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 (1954); *Saturn Oil & Gas Co. v. FPC*, 250 F. 2d 61, 68 (10th Cir. 1957), cert. den. 355 U.S. 956; *Continental Oil Co. v. FPC*, 266 F. 2d 208, 210 (5th Cir. 1959), cert. den. 361 U.S. 827; *Public Service Comm. v. FPC*, 287 F. 2d 143, 145 (D.C. Cir. 1960); *Kansas-Nebraska N. Gas Co. v. State Corp. Comm.*, 169 Kan. 729, 222 P. 2d 704, 710 (1950); *Emerald Coal & Coke Co. v. Equitable Gas Co.*, 378 Pa. 591, 107 A. 2d 734, 737 (1954).

"In *Federal Power Com. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 505, we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural-gas company.'" (347 U.S. at 678).

And in the case at bar, the Courts of Appeals for both the D. C. Circuit and the Fifth Circuit have faithfully followed and applied the doctrine laid down in the *Panhandle* case. *Public Service Comm. v. FPC*, 287 F. 2d 143, 145 (D.C. Cir. 1960); *Marr v. FPC*, 336 F. 2d 320, 323-324, 326, (5th Cir. 1964).

What petitioners are actually seeking here is to have this court reverse itself and overrule its landmark decision in *Panhandle*.¹¹ That would mean — as this Court there held — judicial, rather than congressional, amendment of the Natural Gas Act. This Court declined so to legislate in 1949 and told FPC that if it wished to regulate leasehold transfers, it should go to Congress for such added authority (337 U.S. at 515-516). The Commission did just that, not once, but twelve times in as many years.¹² Congress turned a deaf ear to this full dozen of pleas for more regulatory authority.

The Fifth Circuit Court of Appeals similarly refused to indulge in judicial legislation. "If in its wisdom Congress has declined to act, we have neither the power nor the inclination to act in its stead" (336 F. 2d at 326). The decision of the Court below is, we submit, obviously and eminently correct.

¹¹ FPC admits as much at page 19 of its petition, where it urges that *Panhandle* be "reevaluated".

¹² See Commissioner Woodward's dissenting opinion, including footnote 1 thereto — 30 F.P.C. at 157; R. 1231-1232.

B. *The fact that the Assignors sold leasehold interests in real property — and not the commodity, natural gas — is incontrovertible.*

By the Assignment and Conveyance of July 27, 1959, the Assignors "transferred, assigned and conveyed" their Rayne Field "oil, gas and mineral leases . . . together with all those wells which are presently completed as gas wells and related lease and well equipment . . . and such rights of ingress, egress and easements for such facilities as Grantors have the right to convey" (R. 184). Beyond question, therefore, the sale of leases by Assignors to Texas Eastern was purely and solely a transfer of interests in real property and was *not* a sale of the commodity, natural gas, either "in place" or "in bulk".

This distinction goes to the very heart of the case at bar, because Section 1(b) of the Natural Gas Act expressly limits its application "to the transportation of natural gas in interstate commerce [and] the sale of natural gas in interstate commerce for resale"; and Section 2(5) defines "natural gas" to mean a commodity capable of being so transported and sold: "either gas unmixed, or any mixture of natural and artificial gas."

Natural gas can become a commodity, and therefore a subject of commerce, only after it has been extracted from subterranean strata and reduced to possession. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911); *Pennsylvania v. West Virginia*, 262 U.S. 553, 586 (1923).

When Assignors conveyed their leasehold interests to Texas Eastern, the Rayne Field gas lay buried in porous rock formations more than two miles deep in the earth's crust, where it had been formed and accumulated millions of years before. *It was a part of the realty.* And since it had not yet been brought to the surface or reduced to

possession, it was neither a commodity nor anything capable of being transported in interstate commerce. Consequently, it could not fall within the ambit of FPC jurisdictional authority under the Natural Gas Act.

C. *Petitioners' efforts to transform the sale of leases into a sale of natural gas are completely futile.*

Based on substantially the same record now before this Court, the Commission held in June 1959 that "the purchase of leases is not a contract to purchase gas" (Opinion No. 322, 21 F.P.C. at 867; R. 462). And in its 1960 Brief to the D. C. Court of Appeals, the Commission solemnly represented that this case "centers about a sale of leases. It does *not* concern a purchase of gas in place within the underground reservoir (which Louisiana mineral law does not recognize). Nor, does it involve a contract to sell gas as produced by the assignors" (R. 1185).

Since early 1963, however, the Commission has been insisting that white is black; that the sale of Rayne Field leases was in essence a "sale of natural gas in interstate commerce for resale." To achieve that impossible result, FPC indulges in an amazing assortment of deceptive verbiage and fallacious arguments.¹³ As the entire basis for its arguments, the Commission points an accusing finger at five "features" of the lease sale transaction: (1) Assignors' reservation of rights in deep horizons and in crude oil and other minerals; (2) Assignors' reservation of a production payment payable out of proceeds from sales of natural gas (plant) liquids and separator liquids; (3) provision for acceleration of the purchase-money notes

¹³ *E.g.*, calling the Assignors "producers," a misnomer decried in FPC's own 1960 Brief (R. 1185); characterizing the lease sale as a sale of gas "in place," "in bulk," or in a "block" (FPC Pet. 9, 12, 14, 16); terming mere arguments as FPC "findings" (*Id.* 9-10; cf. UGI Pet. 3, 9, 10).

in the event of stepped-up depletion of the Rayne Field reserves; (4) a Management Agreement under which Continental Oil Company was employed to operate the field as agent for Texas Eastern; and (5) direct liability of Louisiana Gas Corporation, rather than Texas Eastern, on the purchase-money notes (29 F.P.C. at 254; R. 973; FPC Pet. pp. 9-10; UGI Pet. p. 9).

These five "features" were, one and all, valid, reasonable and in no wise unusual in a transaction of the character and magnitude of the one here in controversy (see the opinion below, 336 F. 2d at 324-325, UGI Pet. pp. 10a-11a). Each such feature was, moreover, entirely consistent with a bona fide sale of leasehold interests.¹⁴

(1) *Reservation of rights* in deep, untested strata and in oil and other minerals did not, and could not, transmute the remaining leasehold rights conveyed by Assignors to Texas Eastern into the commodity, natural gas. Such reservations are common and accepted practice in the petroleum industry.¹⁵

(2) *The reservation of a production payment*, payable out of the proceeds from sales of natural gas liquids, was likewise in line with normal practice.¹⁶ This feature of the transaction: (a) relieved Texas Eastern for many years from paying Rayne Field operating costs; (b) provided

¹⁴ "There was no evidence or implication that the negotiations leading to the lease purchase and sale agreements was anything but arm's length and we find that they were arrived at on the basis of arm's length bargaining" (Opinion No. 332, 21 F.P.C. at 867, R. 462).

¹⁵ See: 3 SUMMERS, OIL AND GAS (Perm. ed. 1958), 603, 614; 2 WILLIAMS & MEYERS, OIL AND GAS LAW 269; Merrill, *The Oil and Gas Lease — Major Problems*, 4 Neb. L. Rev. 488, 528, 531 (1962).

¹⁶ See: Bryan, *Overriding Royalty Under Oil, Gas and Mineral Leases in Louisiana*, 29 Tul. L. Rev. 349 (1954).

Texas Eastern with the prospect of substantial additional income after the reserved production payment is satisfied; and (c) conserved Texas Eastern's cash resources by materially reducing the aggregate purchase price.

(3) *The provision for accelerated payment of the purchase-money notes*, in case of exceptionally high takes from the Rayne Field, was merely a method of protecting Assignor's collateral security. Payment of the notes was not "geared to production" as FPC asserts (29 F.P.C. at 254; FPC Pet. p. 10); there was no provision for *decelerated* payments in the event of *decreased* production. Moreover, Texas Eastern's substantial down payment could in no way be "geared to production."

(4) *The Management Agreement* was entered into for the perfectly legitimate safety and business reasons recited in its preambles (R. 827-828). Texas Eastern's Vice President Jacobs so testified without contradiction (R. 578-579). Continental Oil Company acts exclusively as managing agent for Louisiana Gas Corporation (Texas Eastern) under the Agreement (R. 828); and it is Texas Eastern, not Continental, who has the right to make all important operating decisions, such as whether and where wells shall be drilled or deepened (Art. 1(a), R. 829), whether secondary recovery or recycling operations shall be conducted (Art. 5(a), R. 837-838), and what volume of gas shall be nominated for production each month (Art. 5(f), R. 839-840). Contracts of this nature are not uncommon.¹⁷

(5) *Interposition of Louisiana Gas Corporation* shielded Texas Eastern against direct liability (Opinion No. 322, 21 F.P.C. at 865, R. 459). "[T]he manner in which Texas Eastern's arrangements for the purchase of leases were

¹⁷ See 3 SUMMERS, OIL AND GAS (Perm. ed. 1958) 708.

consummated is not unique in the oil and gas business.¹⁸ Texas Eastern's primary reason for handling the arrangements through an intermediary corporation, Louisiana Gas Corporation, was so it would not have any liability for the amount of the notes on its books" (*Id.*, 21 F.P.C. at 867, R. 462; and see Mr. Jacobs' supporting testimony, R. 87-88).

Thus, when these five "features" are viewed objectively, it becomes apparent that they were each and all normal business arrangements which the parties worked out in good faith through arm's length negotiations. These "features" did not and could not convert a sale of leasehold interests in real property into a "sale of natural gas in interstate commerce for resale."

D. FPC can regulate effectively without having jurisdiction over transferors of leases.

There is no genuine basis for petitioners' avowed fear that the decision below will frustrate effective FPC regulation (FPC Pet. pp. 12, 19-21; UGI Pet. pp. 13-14). Gas consumers can be protected by regulating the purchaser of leases rather than by regulating the seller.

Four years ago the D. C. Circuit directed the Commission to "regulate the purchaser, regardless of the status of the sellers" by ascertaining whether Texas Eastern's acquisition costs "will be consistent with the public convenience and necessity" (287 F. 2d at 146). Although the Commission at first embarked upon such an inquiry (Order of July 14, 1961, 26 F.P.C. 167; R. 869-872), it later decided to disregard and disobey the D. C. Circuit's mandate, pre-

¹⁸ There is ample evidence to this effect in the record (R. 86-87), as FPC took pains to point out in its 1960 brief to the D. C. Court of Appeals (R. 1188, footnote 13). "[I]t is not uncommon for a mortgage to be given with the stipulation that the mortgagor shall not be personally bound beyond the value of the property so mortgaged." *Scheznailer v. Fontenot*, 147 La. 467, 85 So. 207, 210 (1920).

ferring, instead, to succumb to the temptation of seizing forbidden jurisdictional powers.

Now, the Fifth Circuit has again remanded the matter to the Commission "to determine whether the public convenience and necessity require that the [Texas Eastern] certificate be denied, granted, or granted conditionally, in view of the cost of acquisition" (336 F. 2d at 326).

Up to now, however, the Commission has declined even to inquire into Texas Eastern's acquisition cost (29 F.P.C. at 256-257, 258; R. 978-979, 981); and until the Commission has at least tried in good faith to comply with the mandates of the two Courts of Appeals in this case, it cannot truthfully say that the method of regulation directed by them is ineffective.

If and when the Commission does obey the mandates of the Courts of Appeals, it must inevitably find that the lease acquisition was consistent with the public convenience and necessity. The undisputed evidence establishes that the acquisition of the leases constituted a prudent investment. The cost of Rayne Field gas to Texas Eastern was "in line" with the cost of other large quantities of gas then connected to Texas Eastern's system (R. 517-522), including the cost of Texas Eastern's other company-owned production (R. 562-563). The record further shows that any purchase under gas purchase contracts of the Rayne Field gas, or of any other comparable and then available gas supply, would have "triggered" price escalations in Texas Eastern's other gas purchase contracts by an amount in excess of \$10 million per annum (R. 544). Thus, the Rayne Field lease acquisition was the only means by which Texas Eastern could satisfy its customers' urgent requirements for additional gas supplies and at the same time "hold the line" on the cost of gas to consumers (R. 544-549).

II.

There are no "special or important reasons" for review of the case by this Court (Supreme Court Rule 19)

- A. *The Court below did not decide "an important question of federal law which has not been, but should be, settled by this court".*

As previously shown (*ante* pp. 11-14), the principal question of law presented here — whether FPC possesses jurisdiction over transfers of leases — was definitely settled in *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). There is no need to settle that question again.

- B. *The Court below did not decide "a federal question in a way in conflict with applicable decisions of this Court".*

FPC asserts that the decision below "reflects an unrealistically narrow reading of *Phillips*" (FPC Pet. p. 12) and that *Panhandle* "should be reevaluated in the light of *Phillips*" (*Id.* p. 19). UGI claims that the decision below "fundamentally undermines" *Phillips*, "runs like a Hausmann boulevard, squarely through the middle" of *Phillips*, yet, remarkably enough, "avoids" *Phillips* (UGI Pet. pp. 11, 13-14). These lame arguments cannot stand up for three reasons: (1) *Phillips* expressly cited *Panhandle* with approval (see *ante*, pp. 13-14). (2) *Phillips* and *Panhandle* are not in conflict, as the D. C. Court of Appeals demonstrated in this very case (287 F. 2d at 145). (3) *Phillips* was concerned with sales in interstate commerce of the commodity, natural gas, which can exist as such only after its extraction from the earth; whereas *Panhandle* dealt — as in our case — with the transfers of leasehold interests in real property before production and interstate

sale of the gas occurred. Accordingly, there is no conflict whatever between the decision below and the outcome in *Phillips*. Indeed, the Fifth Circuit's determination is in perfect consonance with this Court's ruling in *Panhandle*, which firmly established the applicable legal principles.

C. The Court below has not "rendered a decision in conflict with the decision of another court of appeals on the same matter".

Petitioners try to make it appear that the decision below conflicts with the Tenth Circuit's 1957 decision in *Saturn Oil & Gas Co. v. Federal Power Commission*, 250 F. 2d 61, cert. den. 355 U.S. 956 (1958) (FPC Pet. pp. 16-18; UGI Pet. pp. 14-17). A mere reading of the *Saturn* opinion demolishes this contention. There under consideration was the sale of produced gas rather than the sale of leases. What is more, the Tenth Circuit gave full recognition to the *Panhandle* doctrine. The Court there said (250 F. 2d at 68):

"In *Interstate Natural Gas Co. v. Federal Power Commission* [331 U.S. 690] and *Federal Power Commission v. Panhandle Eastern Pipe Line Co.* [337 U.S. 504-505] the court recognized that effect must be given the production or gathering exemption. These cases and *Colorado Interstate Gas Co. v. Federal Power Commission* [324 U.S. 581] are referred to in the *Phillips* decision as holding that the production or gathering exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas and not to the business of production and gathering [347 U.S. 678, 681]. Until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt."

Thus, the Tenth Circuit's decision in *Saturn* is seen to accord exactly with the views expressed by the Fifth Circuit in the case at bar.

CONCLUSION

The petitions of FPC and UGI for writs of certiorari should be denied.

Respectfully submitted,

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